

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 57

UNITED STATES, PETITIONER

vs.

GAETANO LUCCHESI, ETC.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

**PETITION FOR CERTIORARI FILED MARCH 14, 1960
CERTIORARI GRANTED MAY 16, 1960**

Supreme Court of the United States

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[fol. 1] **IN UNITED STATES DISTRICT
COURT
EASTERN DISTRICT OF NEW YORK**

Civil Action #13052

UNITED STATES OF AMERICA, PLAINTIFF

vs.

GAETANO LUCCHESI, also known as THOMAS LUCESI,
also known as THOMAS LUCASE, also known as
THOMAS ARRA, also known as THOMAS LUCESI,
DEFENDANT

COMPLAINT—Filed November 17, 1952

The United States of America, by FRANK J. PARKER, United States Attorney for the Eastern District of New York, herewith presents its complaint under and pursuant to Section 338 of the Nationality Act of 1940, 54 Stat. 1158 (U.S. Code, Title 8, Section 738), against GAETANO LUCCHESI, also known as THOMAS LUCESI, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCESI, and respectfully represents:

1. That the said defendant was born in Italy on December 1, 1899, and was prior to the 25th day of January, 1943 a citizen of Italy.

2. That the said defendant entered the United States on the 21st day of November, 1911, and now resides within the Eastern District of New York and within the jurisdiction of this Court.

3. That on the 21st day of November, 1941, the said defendant filed his petition for naturalization #51652 in the District Court of the United States for the District of New Jersey, Newark, New Jersey.

4. That on the 25th day of January, 1943, the said United States District Court for the District of New Jersey, relying on the truth and good faith of the repre-

sentations made by the said defendant in his petition for naturalization, entered its order admitting him to citizenship in the United States and thereupon Certificate of Naturalization, #5701024, was issued to him on January [fol. 2] 30, 1943 by the Clerk of said Court.

5. That the said defendant, prior to November 21, 1941, filed with the United States Immigration and Naturalization Service an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization in which he certified in writing, in answer to the printed question whether he had ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation, that at age of 20 he had been arrested and convicted for theft of an automobile and sentenced to three years and nine months.

6. That the said defendant, on November 21, 1941, during an examination preliminary to the filing of the aforesaid petition for naturalization did testify under oath before a United States Naturalization Examiner that he had never been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation except that in January 1921 at the age of 20 he had been convicted in the County Court of Suffolk County, Riverhead, New York, of larceny of an automobile for which he was sentenced to imprisonment of three years and nine months of which he served two years and nine months.

7. That the said defendant, on November 21, 1941, during a hearing subsequent to the filing of the petition for naturalization did testify under oath before a United States Naturalization Examiner, who was duly designated by said Court to conduct such hearing, that he had never been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation except that in January 1921 at the age of 20 he had been convicted in the County Court of Suffolk County, Riverhead, New York, of larceny of an automobile for which he was sentenced to imprisonment of three years and nine months of which term he served two years and nine months.

8. That the aforesaid representations made by the said defendant as to his criminal record were false and fraudulent.

9. That in fact and in truth, in addition to the arrest admitted by the defendant as aforesaid, he had prior to [fol. 3] November 21, 1941 been arrested on five other occasions as follows:

on or about August 30, 1927 in New York, N. Y. the defendant was arrested under the name of Thomas Arra on a charge of criminally receiving stolen goods;

on or about July 18, 1928 in New York, N. Y. the defendant was arrested under the name of Thomas Lucase on a charge of homicide (gun);

on or about September 8, 1930 in New York, N. Y. the defendant was arrested under the name of Thomas Luckese on a charge of homicide;

on or about July 4, 1931 the defendant was fingerprinted by the Cleveland, Ohio, Police Department for investigation;

on or about November 18, 1935 the defendant was arrested in New York, N. Y. under the name of Thomas Lucase on a charge of vagrancy.

10. That the aforesaid false and fraudulent representations were made by the defendant and the aforesaid testimony was given by him for the purpose of and in order to deceive the Immigration and Naturalization Service, Department of Justice, United States of America, as well as the United States District Court in order to obtain his naturalization in violation of the law.

11. That in the Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization filed by the said defendant with the United States Immigration and Naturalization Service prior to November 21, 1941, he certified in writing that his full true name and any other name which had been used were Gaetano Lucchese, also known as Thomas Lucchese.

12. That the said defendant on November 21, 1941 during the aforementioned examination preliminary to

the filing for the petition for naturalization testified under oath before a United States Naturalization Examiner that he had never used or been known by any other name than Gaetano Lucchese and Thomas Lucchese.

[fol. 4] 13. That the said defendant on November 21, 1941 during the aforementioned hearing conducted subsequent to the filing of the petition for naturalization did testify under oath before a United States Naturalization Examiner who was duly designated by said Court to conduct such a hearing, that he had never used or been known by any other name other than Gaetano Lucchese and Thomas Lucchese.

14. That the aforesaid representations made by the said defendant as to his name were false and fraudulent.

15. That in fact and in truth in addition to the names Gaetano Lucchese and Thomas Lucchese the defendant had used the name Thomas Arra when arrested in New York, N. Y. on or about August 30, 1937, for criminally receiving stolen goods.

16. That the aforesaid false and fraudulent representations were made by the defendant and the aforesaid testimony was given by him for the purpose of and in order to deceive the Immigration and Naturalization Service, Department of Justice, United States of America, as well as the United States District Court in order to obtain his naturalization in violation of the law.

17. That on December 16, 1940 the said defendant executed an Alien Registration Form pursuant to the Alien Registration Act of 1940 and regulations made thereunder in which he represented under oath that

- a. his name was Gaetano Lucchese and that he was also known by the name of Thomas Lucchese
- b. he had been arrested for larceny in 1920 at New York City, N. Y. for which he was sentenced to three years and nine months.

18. That the aforesaid representations were false and fraudulent in that

- a. the defendant had in truth and in fact used the name of Thomas Arra when arrested in New York City in 1927 for criminally receiving stolen goods.

- b. the defendant had been arrested five additional times as more fully stated in paragraph 9 above.

[fol. 5] 19. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented under oath on December 16, 1940 in an Alien Registration Form required under the provisions of the Alien Registration Act of 1940 and regulations made thereunder that the only names by which he had been known were Gaetano Lucchese and Thomas Lucchese whereas, in fact, he had also been known as Thomas Arra.

20. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented under oath on December 16, 1940 in an Alien Registration Form required under the provisions of the Alien Registration Act of 1940 and regulations made thereunder that his only arrest was in New York City in 1920 for larceny whereas, in fact, he had been arrested on five other occasions as more particularly set forth in paragraph 9 above.

21. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented in the course of his naturalization proceedings both in the preliminary written application filed before November 21, 1941 and in his sworn testimony of November 21, 1941 before various United States Naturalization Examiners that the only names by which he had been known were Gaetano Lucchese and Thomas Lucchese whereas, in fact, he had also been known as Thomas Arra.

22. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented in the course of his naturalization proceedings both in the preliminary written application filed before November 21, 1941 and in his sworn testimony of November 21, 1941 before various United States Naturalization Examiners that his only arrest was at the age of 20 in the County Court, Riverhead, Long Island, New York when he was convicted for theft of an automobile, whereas, in fact,

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he had been arrested on five other occasions as more particularly set forth in paragraph 9 above.

[fol. 6] 23. That the naturalization of the said defendant was illegally and fraudulently procured.

24. That good cause exists for the institution of a suit under Section 338 of the Naturalization Act of 1940 (8 U.S.C. 738) to set aside and cancel naturalization of the said Gaetano Lucchese as having been illegally and fraudulently procured.

WHEREFORE the plaintiff prays that the aforesaid Certificate of Naturalization No. 5701024, Petition No. 51652 and order of the United States District Court for the District of New Jersey at Newark, New Jersey entered on the 25th day of January 1943, whereby the defendant was admitted to be and became a citizen of the United States of America, be vacated, cancelled and set aside, and that said defendant be forever restrained and enjoined from setting up or claiming any rights, privileges, benefits, or advantages whatsoever under the said order, and said certificate of naturalization, and that the Clerk of this Court be directed to transmit a certified copy of the judgment to be entered herein, to the Immigration and Naturalization Service of the Department of Justice, at Washington, D. C. and that summons be issued out of and under the seal of this Court, directed to the defendant, commanding him, within sixty days after the service of a copy thereof upon him, exclusive of the day of service, to appear before this Court and then and there answer the complaint herein, and abide the order and decree of this Court, and that plaintiff have such other and further relief as to the Court may seem just and proper in the premises.

/s/ Frank J. Parker
United States Attorney
Eastern District of New York
Attorney for Plaintiff
519 Federal Building
271 Washington Street
Brooklyn 1, New York

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[fol. 7] *Duly sworn to by Frank J. Parker. Jurat omitted in printing.*

[fol. 7A] • • • •

[fol. 7B] (File Endorsement Omitted)

[fol. 8] IN UNITED STATES DISTRICT
COURT
EASTERN DISTRICT OF NEW YORK

Civ. 13052

UNITED STATES OF AMERICA, PLAINTIFF

v.

GAETANO LUCCHESI, also known as THOMAS LUCCHESI,
also known as THOMAS LUCASE, also known as
THOMAS ARRA, also known as THOMAS LUCCHESI,
DEFENDANT

AFFIDAVIT OF RALPH FARB—Filed November 23, 1955

STATE OF NEW YORK, COUNTY OF KINGS) ss:

RALPH FARB, being duly sworn, says: That he is an attorney for the Immigration and Naturalization Service, United States Department of Justice, and as such has access to the official records of the said Service.

That as more fully appears from the attached complaint of the United States against Gaetano Lucchese, etc., which complaint seeks revocation of defendant's naturalization, good cause exists for revocation of naturalization for the following reasons:

1. The defendant fraudulently procured naturalization in that he misrepresented facts as to his name and identity and also as to his record of arrests.

2. The defendant's naturalization was illegally procured in that at the time of admission to citizenship he had not been for the period required by law, a person of good moral character, having both in naturalization

proceedings and in alien registration proceedings made false and fraudulent representations under oath.

/s/ Ralph Farb

Sworn to before me this 17th day of November, 1952

[SEAL]

/s/ William H. Sperling
WILLIAM H. SPERLING.

Notary Public in the State of N. Y. No. 41-9125200.
Qualified in Queens County. Certificates filed with Kings
& Queens Co. Clk's & Reg. Off. Commission Expires
March 30, 1954

[fol. 8A]

⁵⁴
AFFIDAVIT OF MAILING
(Omitted in printing)

• • • • •

[fol. 8B]

(File Endorsement Omitted)

[fol. 9] IN UNITED STATES DISTRICT
COURT
EASTERN DISTRICT OF NEW YORK

Civil No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESI, DEFENDANT

NOTICE OF AND MOTION TO DISMISS THE COMPLAINT—
Filed March 26, 1956

SIR:

PLEASE TAKE NOTICE that upon the complaint herein, and upon the affidavit of RALPH FARB sworn to November 17th, 1952 and filed on November 23rd, 1955, the undersigned will move this Court at a term thereof for the hearing of motions to be held at the United States Court-house and Post Office Building, 271 Washington Street, Borough of Brooklyn, City of New York, on the 4th day of April, 1956 at 10:30 o'clock in the forenoon for an order dismissing the complaint upon the ground that the proceeding was not instituted upon an affidavit showing good cause therefor as required by Section 338 (a) of the Nationality Act of 1940 for the reasons that:

1. The affidavit of RALPH FARB fails to set forth facts showing good cause for the institution of the proceeding.
2. The affidavit of RALPH FARB shows upon its face that the proceeding was not instituted upon said affidavit.
3. The affidavit of RALPH FARB was not filed at the time the action was instituted, but was filed on November 23rd, 1955.

[fol. 10] and for such other and further relief as may be just and proper.

Dated, New York, N. Y., March 26th, 1956.

Yours, etc.,

/s/ Richard J. Burke,
Attorney for Defendant,
Office & P.O. Address,
60 Wall Street,
New York 5, N. Y.

To:

LEONARD P. MOORE, Esq.,
United States Attorney
Eastern District of New York
Attorney for Plaintiff
Federal Building,
Brooklyn, New York.

[fol. 10A] (File Endorsement Omitted)

[fol. 11] IN UNITED STATES DISTRICT
COURT FOR THE
EASTERN DISTRICT OF NEW YORK

April, 11, 1956

Civ-13052

UNITED STATES OF AMERICA

vs.

GAETANO LUCCHESI

Before INCH, J.

Appearances: Richard J. Burke, Attorney for Defendant
for Motion.

Leonard P. Moore, U. S. Attorney for
Plaintiff by Elliott S. Greenspan, Asst.
U. S. Attorney, in opposition.

Motion argued and submitted. Decision reserved.

MEMORANDUM OPINION DENYING MOTION TO DISMISS
COMPLAINT—April 17, 1956

This is a motion to dismiss the complaint upon the ground that the proceeding was not instituted upon an affidavit showing good cause therefor. Two of the three contentions in support of this motion, set forth in the notice thereof as reasons 2 and 3, were passed on by me in my decision and order determining a prior motion to dismiss the complaint upon the ground that the United States Attorney had not filed an affidavit showing good cause for the institution of the proceeding. The third contention in support of this motion, set forth in the notice thereof as reason 1, is without merit. The affidavit filed by the United States Attorney is sufficient (United States v. Leles, 227 Fed. 189; United States v. Chandler, 132 Fed. Supp. 650). Therefore, this motion is, in all respects, denied. Settle order.

/s/ Robert Inch

April 17, 1956

Chief Judge, U. S. District Court

[fol. 12] IN UNITED STATES DISTRICT
COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESI, DEFENDANT

ORDER DENYING MOTION TO DISMISS COMPLAINT—
April 30, 1956

At Brooklyn, New York, in said District, on the 30th day of April, 1956.

The defendant having moved by Notice of Motion dated March 26, 1956, for an order dismissing the complaint upon the ground that the proceeding was not instituted upon an affidavit showing good cause therefor as required by the Nationality Act of 1940, and after reading the aforesaid Notice of Motion and after hearing RICHARD J. BURKE, Esq., in support of the motion, and LEONARD P. MOORE, United States Attorney for the Eastern District of New York, ELLIOTT S. GREENSPAN, Esq., Assistant United States Attorney, of counsel, in opposition thereto, and upon filing the memorandum opinion of the Court,

Now, on motion of Leonard P. Moore, United States Attorney for the Eastern District of New York, attorney for the plaintiff, it is

ORDERED, that, the defendant's Motion for an Order Dismissing the Complaint be and the same hereby is in all respects denied.

/s/ Robert Inch
United States District Judge

[fol. 12A] AFFIDAVIT OF MAILING
(Omitted in printing)

[fol. 12B] (File Endorsement Omitted)

[fol. 13] IN UNITED STATES DISTRICT
COURT FOR THE
EASTERN DISTRICT OF NEW YORK

At 10:30 A.M.

Civ-13052

UNITED STATES OF AMERICA

- VS -

GAETANO LUCCHESI

Motion for an order granting the defendant leave to reargue said motions on the authority of the decision of the Supreme Court of the United States in the case entitled United States of America against Ettore Zucca, decided April 30, 1956 and for an order on such reargument dismissing the complaint.

Appearances: Richard J. Burke, Attorney for Defendant.

Leonard P. Moore, U. S. Attorney, for Plaintiff.

Motion Argued & Submitted

All Papers by July 2, 1956.

MEMORANDUM OPINION—July 3, 1956

This is a motion by defendant for leave to reargue his motions to dismiss the complaint upon the ground that this denaturalization proceeding was not instituted upon the filing of an affidavit showing good cause therefor and, upon such reargument, for a dismissal of the complaint, on the authority of the decision in United States v. Zucca, 351 U.S. 91. In that case, the United States Supreme Court held that, in a denaturalization proceeding, such as the instant one, the filing of the affidavit showing good cause is a procedural prerequisite to the initiation and maintenance of the proceeding. Therefore, this motion is granted and, after such reargument, the complaint is dismissed, without prejudice to the government's right to institute a proceeding to denaturalize the defendant upon the filing of the required affidavit. (United States v. Zucca, *supra*). Settle order.

/s/ Robert Inch

July 3, 1956.

Chief Judge, U. S. District Court

[fol. 14] IN UNITED STATES DISTRICT
COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESI, DEFENDANT

ORDER GRANTING MOTION FOR LEAVE TO REARGUE, ETC.—
October 15, 1956

At Brooklyn, New York, in said District, on the 15th day of October, 1956.

The defendant having moved by Notice of Motion dated June 11, 1956, for an order granting the defendant leave to reargue his motion dated October 27, 1955, for an order dismissing the complaint on the ground that this Court lacks jurisdiction of the subject matter, and for leave to reargue his motion dated March 26, 1956, for an order dismissing the complaint upon the ground that the proceeding was not instituted upon an affidavit showing good cause therefor, and for an order on such reargument dismissing the complaint upon the ground that the proceeding was not instituted upon an affidavit showing good cause therefor, and after reading the aforesaid Notice of Motion and after hearing RICHARD J. BURKE, Esq., MYRON L. SHAPIRO, Esq., of counsel, in support of the motion; and LEONARD P. MOORE, United States Attorney for the Eastern District of New York, ELLIOTT S. GREENSPAN, Esq., Assistant United States Attorney, of counsel, in opposition thereto, and upon filing the memorandum opinion of the Court it is

ORDERED, that the defendant's Motion for an Order granting leave to reargue is granted and it is further

ORDERED, that the complaint be dismissed without prejudice to the Government's right to institute a proceeding

to denaturalize the defendant upon the filing of the required affidavit.

/s/ Robert Inch
United States District Judge

[fol. 14A] AFFIDAVIT OF PERSONAL SERVICE
 (Omitted in printing)

[fol. 14B] (File Endorsement Omitted)

[fol: 15] IN UNITED STATES DISTRICT
COURT
EASTERN DISTRICT OF NEW YORK

Civil No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESI, DEFENDANT

NOTICE OF APPEAL—Filed November 9, 1956

NOTICE IS HEREBY GIVEN that the plaintiff, United States of America, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of United States District Judge Robert A. Inch, entered in this action on October 15, 1956, and from each and every part thereof.

Dated: Brooklyn, New York

November 9, 1956.

LEONARD P. MOORE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
271 Washington Street
Brooklyn, New York

By:
/s/ Elliott S. Greenspan
Assistant U. S. Attorney

To:

PERCY G. B. GILKES
CLERK, United States District Court,
Eastern District of New York,
271 Washington Street,
Brooklyn, New York
RICHARD J. BURKE, Esq.,
Attorney for Defendant,
60 Wall Street,
New York, New York

[fol. 13A]

[fol. 15B] (File Endorsement Omitted)

[fol. 16] IN UNITED STATES COURT
OF APPEALS
FOR THE SECOND CIRCUIT

No. 274—October Term, 1956.

Argued March 15, 1957

Docket No. 24424

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

—v.—

GAETANO LUCCHESI, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE, DEFENDANT-APPELLEE

Before: HINCKS, STEWART and LUMBARD, *Circuit Judges*.

In an action by the government to cancel the defendant's naturalization for fraud and misrepresentation, under § 338(a) of the Nationality Act of 1940, 54 Stat. 1158, later amended by 66 Stat. 239 (1952), 8 U. S. C. A. § 1451 (a), the District Court for the Eastern District of New York, Inc., J., dismissed the complaint for failure to file an affidavit of good cause at the time the action was instituted. Reversed.

[fol. 17] LEONARD P. MOORE, United States Attorney, Eastern District of New York, Brooklyn, N. Y. (Elliott S. Greenspan, Assistant United States Attorney, of counsel), *for plaintiff-appellant*.

RICHARD J. BURKE, New York, N. Y. (Myron L. Shapiro, of counsel), *for defendant-appellee*.

OPINION—June 17, 1957

LUMBARD, *Circuit Judge*;

This is a denaturalization action brought under § 338 (a) of the Nationality Act of 1940, 54 Stat. 1158,¹ later amended by 66 Stat. 239 (1952), 8 U.S.C.A. § 1451(a), in which the government appeals from an order dismissing its complaint for failure to file an affidavit of good cause at the commencement of the proceeding. The District Court held that filing the affidavit after the complaint did not comply with the statutory requirement. On the authority of *United States v. Matles*, decided June 10, 1957, we reverse.

Lucchese was naturalized in 1943. Prior to this, in 1941, he filed an application for a Certificate of Arrival and Preliminary Form for Petition of Naturalization, in which he admitted to one conviction for theft of an automobile in 1921 and swore that other than this he had never been arrested or charged with violation of the law. [fol. 18] He also swore to this on an Alien Registration Form on December 16, 1940 and reiterated it before a Naturalization Examiner at a hearing on November 21, 1941, preliminary to the filing of the naturalization petition.

On the Alien Registration Form, the application, and at the hearing, he also swore that he had never been known by any name other than either Gaetano Lucchese or Thomas Lucchese.

On November 17, 1952 the Government filed a verified complaint to denaturalize Lucchese under § 338(a) of the

¹ Nationality Act of 1940:

Sec. 338(a). Revocation of Naturalization.

It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured. [8 U.S.C., 1940 Ed.; Sec. 738(a).]

Nationality Act of 1940. In the complaint it was alleged (1) that Lucchese's statements about his criminal record were false for he had been arrested not once but many times, and the complaint listed the dates, places and charges of five arrests in addition to the one he had admitted to; (2) that he had lied in testifying about the names he had used, for he had also used the name "Thomas Arra" when arrested in 1927 for receiving stolen goods; (3) that all these misrepresentations were for the purpose of fraudulently procuring citizenship; and (4) that these misrepresentations indicated that he was not a person of good moral character during the period required by law. The details of the complaint are material to this appeal, and we therefore set them out in the margin.²

²

* * * * *

"3. That on the 21st day of November, 1941, the said defendant filed his petition for naturalization #51652 in the District Court of the United States for the District of New Jersey, Newark, New Jersey.

4. That on the 25th day of January, 1943, the said United States District Court for the District of New Jersey, relying on the truth and good faith of the representations made by the said defendant in his petition for naturalization, entered its order admitting him to citizenship in the United States and thereupon Certificate of Naturalization, #5701024, was issued to him on January 30, 1943 by (2) the Clerk of said Court.

5. That the said defendant, prior to November 21, 1941, filed with the United States Immigration and Naturalization Service an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization in which he certified in writing, in answer to the printed question whether he had ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation, that at age of 20 he had been arrested and convicted for theft of an automobile and sentenced to three years and nine months.

6. That the said defendant, on November 21, 1941, during an examination preliminary to the filing of the aforesaid petition for naturalization did testify under oath before a United States Naturalization Examiner that he had never been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation except that in January 1921 at the age of 20 he had been convicted in the County Court of Suffolk County, River-

[fol. 19] No affidavit of good cause was filed with the complaint on November 17, 1952. However, such an affi-

head, New York, of larceny of an automobile for which he was sentenced to imprisonment of three years and nine months of which he served two years and nine months.

7. That the said defendant, on November 21, 1941, during a hearing subsequent to the filing of the petition for naturalization did testify under oath before a United States Naturalization Examiner, who was duly designated by said Court to conduct such hearing, that he had never been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation except that in January 1921 at the age of 20 he had been convicted in the County Court of Suffolk County, Riverhead, New York, of larceny of an automobile for which he was sentenced to imprisonment of three years and nine months of which term he served two years and nine months.

8. That the aforesaid representations made by the said defendant as to his criminal record were false and fraudulent.

9. That in fact and in truth, in addition to the arrest admitted by the defendant as aforesaid, he had prior to November 21, 1941 been (3) arrested on five other occasions as follows:

on or about August 30, 1927 in New York; N. Y. the defendant was arrested under the name of Thomas Arra on a charge of criminally receiving stolen goods;

on or about July 18, 1928 in New York; N. Y. the defendant was arrested under the name of Thomas Lucase on a charge of homicide (gun);

on or about September 8, 1930 in New York, N. Y. the defendant was arrested under the name of Thomas Luckese on a charge of homicide;

on or about July 4, 1931 the defendant was fingerprinted by the Cleveland, Ohio, Police Department for investigation;

on or about November 18, 1935 the defendant was arrested in New York, N. Y. under the name of Thomas Lucase on a charge of vagrancy.

10. That the aforesaid false and fraudulent representations were made by the defendant and the aforesaid testimony was given by him for the purpose of and in order to deceive the Immigration and Naturalization Service, Department of Justice, United States of America, as well as the United States District Court in order to obtain his naturalization in violation of the law.

11. That in the Application for a Certificate of Arrival

[fol. 20] davit was apparently drawn up on that date, for the affidavit ultimately filed on November 23, 1955

and Preliminary Form for Petition for Naturalization filed by the said defendant with the United States Immigration and Naturalization Service, prior to November 21, 1941, he certified in writing that his full true name and any other name which had been used were Gaetano Lucchese, also known as Thomas Lucchese.

12. That the said defendant on November 21, 1941 during the aforementioned examination preliminary to the filing for the petition for naturalization testified under oath before a United States Naturalization Examiner that he had never used or been known by any other name than Gaetano Lucchese and Thomas Lucchese.

(4) 13. That the said defendant on November 21, 1941 during the aforementioned hearing conducted subsequent to the filing of the petition for naturalization did testify under oath before a United States Naturalization Examiner who was duly designated by said Court to conduct such a hearing, that he had never used or been known by any other name other than Gaetano Lucchese and Thomas Lucchese.

14. That the aforesaid representations made by the said defendant as to his name were false and fraudulent.

15. That in fact and in truth in addition to the names Gaetano Lucchese and Thomas Lucchese the defendant had used the name Thomas Arra when arrested in New York, N. Y. on or about August 30, 1927, for criminally receiving stolen goods.

16. That the aforesaid false and fraudulent representations were made by the defendant and the aforesaid testimony was given by him for the purpose of and in order to deceive the Immigration and Naturalization Service, Department of Justice, United States of America, as well as the United States District Court in order to obtain his naturalization in violation of the law.

17. That on December 16, 1940 the said defendant executed an Alien Registration Form pursuant to the Alien Registration Act of 1940 and regulations made thereunder in which he represented under oath that

- a. his name was Gaetano Lucchese and that he was also known by the name of Thomas Lucchese
- b. he had been arrested for larceny in 1920 at New York City, N. Y. for which he was sentenced to three years and nine months.

18. That the aforesaid representations were false and fraudulent in that

- a. the defendant had in truth and in fact used the name of

[fol. 21] was dated the same day as the verified complaint and referred to it as "the attached complaint." This affidavit, sworn to by Ralph Farb, an Attorney for the Immigration and Naturalization Service, stated:

Thomas Arra when arrested in New York City in 1927 for criminally receiving stolen goods

- b. the defendant had been arrested five additional times as more fully stated in paragraph 9 above.

(5) 19. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented under oath on December 16, 1940 in an Alien Registration Form required under the provisions of the Alien Registration Act of 1940 and regulations made thereunder that the only names by which he had been known were Gaetano Lucchese and Thomas Lucchese whereas, in fact, he had also been known as Thomas Arra.

20. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented under oath on December 16, 1940 in an Alien Registration Form required under the provisions of the Alien Registration Act of 1940 and regulations made thereunder that his only arrest was in New York City in 1920 for larceny whereas, in fact, he had been arrested on five other occasions as more particularly set forth in paragraph 9 above.

21. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented in the course of his naturalization proceedings both in the preliminary written application filed before November 21, 1941 and in his sworn testimony of November 21, 1941 before various United States Naturalization Examiners that the only names by which he had been known were Gaetano Lucchese and Thomas Lucchese whereas, in fact, he had also been known as Thomas Arra.

22. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented in the course of his naturalization proceedings both in the preliminary written application filed before November 21, 1941 and in his sworn testimony of November 21, 1941 before various United States Naturalization Examiners that his only arrest was at the age of 20 in the County Court, Riverhead, Long Island, New York when he was convicted for theft of an automobile,

[fol. 22] " * * * [A]s more fully appears from the attached complaint of the United States against Gaetano Lucchese, etc., which complaint seeks revocation of defendant's naturalization, good cause exists for revocation of naturalization for the following reasons:

1. The defendant fraudulently procured naturalization in that he misrepresented facts as to his name and identity and also as to his record of arrests.
2. The defendant's naturalization was illegally procured in that at the time of admission to citizenship he had not been for the period required by law, a person of good moral character, having both in naturalization proceedings and in alien registration proceedings made false and fraudulent representations under oath."

On October 27, 1955 Lucchese moved to dismiss the complaint for failure to file the affidavit. The government, on November 23, 1955, then filed the affidavit which was dated November 17, 1952, and Judge Inch denied the motion on the ground that the affidavit requirement had been satisfied.

On March 26, 1956 Lucchese again moved to dismiss on the grounds that (1) the affidavit failed to set forth the [fol. 23] facts showing good cause for the institution of the proceeding; (2) the affidavit itself showed that the action was not based on the affidavit; (3) the affidavit was filed after the complaint. Judge Inch again denied the motion.

After the decision in *United States v. Zucca*, 351 U.S. 91 (April 30, 1956), Lucchese moved to reargue his mo-

whereas, in fact, he had been arrested on five other occasions as more particularly set forth in paragraph 9 above.

(6) 23. That the naturalization of the said defendant was illegally and fraudulently procured.

24. That good cause exists for the institution of a suit under Section 338 of the Nationality Act of 1940 (8 U.S.C. 738) to set aside and cancel naturalization of the said Gaetano Lucchese as having been illegally and fraudulently procured."

* * *

tions on the ground that the decision in *Zucca* supported each of the three grounds for dismissal that he had previously presented. Judge Inch held that *Zucca* required the affidavit to be filed with the complaint and, reversing his prior rulings, dismissed the complaint.

Whether the affidavit must be filed with the complaint was one of the issues before this court in *United States v. Matles, supra*, in which it was held that the affidavit can be filed after the complaint and that *United States v. Zucca, supra*, does not require otherwise. Hence, on the authority of *United States v. Matles*, we reject the defendant's reading of *Zucca*.

For the reasons stated in the *Matles* decision, we also reject defendant's contention that the affidavit of good cause must be made by someone with personal knowledge of the facts sworn to. See also *United States v. Costello*, 142 F. Supp. 290 (S. D. N. Y. 1956).

Lucchese further contends that the good cause affidavit is inadequate because it does not contain evidentiary facts in support of the complaint but merely the conclusory statements that defendant fraudulently procured citizenship by misrepresentations as to his name, identity and criminal record, and that because of these misrepresentations he did not satisfy the good moral character requirements.

Examination of the affidavit discloses that it contained more than these conclusory statements which, by themselves, would certainly be insufficient. These conclusions [fol. 24] were prefaced by an incorporation by reference of the complaint, in these words:

" . . . as more fully appears from the attached complaint of the United States v. Gaetano Lucchese, etc., which complaint seeks revocation of defendant's naturalization, good cause exists for revocation of naturalization. . . . "

As noted, the complaint contained detailed allegations setting forth many evidentiary matters,³ and, if incorporated, would bring the affidavit up to the standard which *Zucca* seems to have established, 351 U. S. at 99.

³ See note 2 *supra*.

Lucchese claims, however, that this attempted incorporation by reference is ineffective, for no complaint was attached to the affidavit and he therefore could not know that the complaint herein was intended. This contention is frivolous. The record discloses only one denaturalization complaint outstanding against Lucchese, and that was dated the same day as the affidavit, although as we have stated, the affidavit was not filed until much later. It is inconceivable that Lucchese or anyone else who had read and had possession of the original complaint could be at all uncertain as to which complaint was referred to.

Lucchese also seems to contend that under § 338(a) the action must be based "upon [an] affidavit showing good cause therefor," and that this action was not, but upon records in the Immigration and Naturalization Service and the Federal Bureau of Investigation. He seems to interpret the word "upon" to mean that the affidavit must be the source of the information on which the government bases its action. The affidavit must therefore be in existence prior to the initiation of the action and, he contends, that was not true here, for whatever complaint was referred to in this affidavit the latter was drawn up after that complaint.

In support of his argument that the action was not based upon the affidavit herein, Lucchese points to these factors: (1) verification in the complaint does not refer to the affidavit as the source of information but rather to "correspondence, papers and reports"; (2) the affidavit does not itself state the evidentiary matter but refers to the complaint, and this, he contends, necessarily implies that the affidavit was drawn up after the complaint and that the action could not have been based on the affidavit.

While agreeing with Lucchese's interpretation of the statutory use of "upon," see *United States v. Zucca*, 351 U.S. at 100, we do not agree that the statute was not complied with.

As to the first point, "correspondence, papers and reports" are words sufficiently broad and comprehensive to include an affidavit. Secondly, we are not persuaded that the affidavit was not drawn up until after the complaint was filed, simply because the affidavit incorporates

the allegations of the complaint. The use of this shorthand device indicates only that the two documents were drawn up at about the same time. It does not imply that the affidavit was drawn up after the complaint was filed. On the contrary, it would seem that here the affidavit and complaint were drawn up at about the same time, and were completed by November 17, 1952 when the complaint was filed. Apparently it was not the practice to file the affidavit with the complaint and so the affidavit was kept in the files of the United States Attorney. But regardless of whether the affidavit was filed with the complaint or later, see *United States v. Matles, supra*, suit was commenced only after an affidavit of good cause had been executed, and that constitutes full compliance with the [fol. 26] statutory requirement of § 338(a) that the suit be based upon the affidavit.

In § 338(a) Congress sought to guard against the misadventure that suits with such serious possible consequences to naturalized citizens might be commenced without a careful preliminary study and a finding simultaneous with the filing of the suit that there was good cause for its commencement. In this case the date and contents of the affidavit show that the defendant has enjoyed the protection which Congress intended he should have. The motion to dismiss the complaint should have been denied.

Accordingly we reverse the order of the District Court.

STEWART, *Circuit Judge*, concurring:

In view of *United States v. Zucca*, 351 U. S. 91, the district court held that a denaturalization proceeding could not be maintained when the affidavit of good cause was filed subsequent to the complaint. My independent view is that the district court was correct.

The concluding words of the prevailing opinion in *Zucca* seem to me unambiguous: "The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this dan-

ger and provided that a person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a *preliminary showing* of good cause. Such a safeguard must not be lightly regarded. We believe that, not only in some cases but in all cases, the District Attorney must, as a *prerequisite to the initiation* of such proceedings, file an affidavit showing good cause." [Emphasis added] 351 U. S. 99-100.

[fol. 27] I agree with my brethren, however, that the law of this circuit is now otherwise. For that reason alone I concur. While a distinction could be made between this case and *United States v. Matles*, — F. (2d) —, June 10, 1957, in that an amended complaint was filed there, the basic issue is substantially the same in both cases.

[fol. 28] IN UNITED STATES COURT
OF APPEALS
FOR THE SECOND CIRCUIT

Present: HON. CARROLL C. HINCKS
HON. POTTER STEWART
HON. J. EDWARD LUMBARD

Circuit Judges.

UNITED STATES, PLAINTIFF-APPELLANT

VS

GAETANO LUCCHESI, DEFENDANT-APPELLEE

JUDGMENT—June 17, 1957

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

A. DANIEL FUSARO,
Clerk

[fol. 28A] (File Endorsement Omitted)

[fol. 29] SUPREME COURT OF THE
UNITED STATES

No. 450, October Term, 1957.

13052

GAETANO LUCCHESI, PETITIONER

VS.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Second Circuit, and was duly submitted.

On consideration whereof, it is ordered and adjudged by this court that the judgment of said United States Court of Appeals, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of New York with direction to dismiss the complaint. An affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings. The affidavit must be filed with the complaint when the proceedings are instituted. *United States v. Zucca*, 351 U.S. 91, 99-100.

April 7, 1958

A true copy

(SEAL)

John T. Fey,

Test:

Clerk of Supreme Court of the United States
Certified this Ninth day of May 1958

By

Deputy

[fol. 30] IN UNITED STATES DISTRICT
COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESI, also known as THOMAS LUCKESE,
also known as THOMAS LUCASE, also known as
THOMAS ARRA, also known as THOMAS LUCHESE,
DEFENDANT

JUDGMENT ENTERED ON REMAND, DISMISSING THE
COMPLAINT—July 16, 1959

At Brooklyn, New York, in said District, on the 16th day of July 1959.

Plaintiff having appealed to the United States Court of Appeals for the Second Circuit from an Order of this Court dated and entered on October 15th, 1956, dismissing the Complaint herein without prejudice to plaintiff's right to institute a proceeding to denaturalize defendant upon the filing of an Affidavit showing good cause therefor, and that Court having reversed said Order by Judgment dated and entered on June 17th, 1957, and defendant having thereafter petitioned the Supreme Court of the United States for a Writ of Certiorari, and that Court having granted same and then rendered Judgment on April 7th, 1958, and a certified copy of said Judgment having been duly filed by the Clerk of this Court on May 12th, 1958,

Now, on motion of Richard J. Burke, attorney for the defendant, it is

[fol. 31] ORDERED, ADJUDGED AND DECREED that said Judgment of the Supreme Court of the United States be, and the same hereby is made the Judgment of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that the Complaint herein be, and the same hereby is dismissed without costs to either party.

/s/ Robert Inch
United States District Judge

[fol. 31A] (File Endorsement Omitted)

[fol. 32] IN UNITED STATES DISTRICT
COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESI, also known as THOMAS LUCCHESI,
also known as THOMAS LUCASE, also known as
THOMAS ARRA, also known as THOMAS LUCHESE,
DEFENDANT

NOTICE OF AND MOTION FOR RESETTLEMENT OF THE
JUDGMENT—Filed July 20, 1959

SIR:

PLEASE TAKE NOTICE that upon the annexed Affidavit of IRWIN J. HARRISON, Assistant United States Attorney for the Eastern District of New York, duly sworn to the 16th day of July 1959, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court, at a Term for Motions to be held before the Honorable ROBERT A. INCH, United States District Judge, in Room 312, at the United States Court House, 271 Washington Street, Borough of Brooklyn, City and State of New York, on the 24th day of July 1959, at 10:30 a.m. in the forenoon of that day, or as soon thereafter as counsel can be heard, for resettlement of the

Order on Judgment signed and entered on July 16th, 1959, and for such other and further relief as to this Court may seem just and proper.

Dated: Brooklyn, New York, July 16th, 1959.

Yours, etc.,

CORNELIUS W. WICKERSHAM, JR.,
United States Attorney,
Eastern District of New York,
Attorney for Plaintiff,
271. Washington Street,
Brooklyn 1, New York.

By: /s/ Irwin J. Harrison,
IRWIN J. HARRISON,
Assistant United States Attorney.

To:

RICHARD J. BURKE, Esq.,
Attorney for Defendant,
60 Wall Street,
New York 5, New York.

[fol. 33] IN UNITED STATES DISTRICT
COURT
EASTERN DISTRICT OF NEW YORK

AFFIDAVIT OF IRWIN J. HARRISON

STATE OF NEW YORK)
COUNTY OF KINGS) SS:

IRWIN J. HARRISON, being duly sworn, deposes and says:

I am an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such, and am familiar with and in charge of this proceeding.

This Affidavit is submitted in support of plaintiff's motion for resettlement of the Order on Judgment signed and entered herein on July 16th, 1959.

On July 16th, 1959, both plaintiff and defendant submitted proposed Orders on Judgment.

The essential difference between these two proposed Orders on Judgment was that plaintiff's proposed Order provided for dismissal of the Complaint herein without prejudice, whereas, defendant's proposed Order merely provided for dismissal.

No briefs were filed by plaintiff with its proposed Order inasmuch as a hearing to determine whether the Court should sign the proposed Order on Judgment of plaintiff, or that of defendant, was requested by plaintiff [fol. 34] by Notice of Request for Hearing dated July 15th, 1959, and Affidavit of Irwin J. HARRISON, Assistant United States Attorney, duly sworn to that same day, both of which were filed with the Clerk of this Court on July 16th, 1959 at 10:00 a.m., at which hearing plaintiff expected to explain to the Court the significance of the difference between the two Orders, and the reasons for signing plaintiff's Order.

On July 16th, 1959, without disposing of plaintiff's request for such a hearing, this Court signed the Order on Judgment submitted by defendant.

WHEREFORE, I respectfully request:

1. That the Order on Judgment signed and entered on July 16th, 1959 be resettled;
2. That a hearing, as described above, be scheduled by this Court for August 7th, 1959; and
3. Such other and further relief as to this Court may seem just and proper.

/s/ Irwin J. Harrison

Sworn to before me this 16th day of July 1959.

/s/ Peter A. Passalacqua
PETER A. PASSALACQUA

Notary Public, State of New York; No. 24-3028600.
Qualified in Kings County. Cert. filed with Kings &
Queens Co. Reg. Commission Expires March 30, 1961.

[fol. 34A] **AFFIDAVIT OF MAILING**
(Omitted in printing)

[fol. 34B] (File Endorsement Omitted)

[fol. 35] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

C-13052

UNITED STATES OF AMERICA

v.

GAETANO LUCCHESI

Brooklyn, New York

HEARING ON MOTION FOR RESETTLEMENT—July 24, 1959

Before: HONORABLE ROBERT A. INCH., U.S.D.J.

APPEARANCES:

CORNELIUS W. WICKERSHAM, Jr., Esq.,
United States Attorney for the
Eastern District of New York

By: IRWIN J. HARRISON, Esq.,
Assistant United States Attorney
Of Counsel

RICHARD J. BURKE, Esq.,
Attorney for Defendant
60 Wall Street
New York, New York

Motion for resettlement of the Order of Judgment
signed and entered on July 16, 1959, etc.

[fol. 36] MR. HARRISON: Before I proceed into the factual matter of the Government's motion to resettle the Order, I want to have one question clarified, and that is, in signing the proposed Order on Judgment submitted by the Defendant, which provided merely for dismissal, were you exactly and expressly merely following the language

of the Supreme Court's judgment, and not in any way passing upon the question of whether this was a dismissal with or without prejudice?

THE COURT: I follow the Supreme Court's decision—it is plain enough. They directed the complaint be dismissed.

MR. HARRISON: What I meant, you weren't in any way passing upon the question that this dismissal constituted a bar to subsequent action.

THE COURT: My original order said without prejudice, and you took advantage of that properly.

It went to the Court of Appeals and you argued it all out. Then you went from them to the Supreme Court of the United States. The Supreme Court of the United States makes the final decision.

There isn't anything for me to do except sign an order dismissing the complaint. We have been fooling around with this thing for sometime.

[fol. 37] I intend to follow the Supreme Court of the United States, which is a plain decision, that the complaint should be dismissed. That is all it is.

MR. HARRISON: You were going no further than that.

THE COURT: That is what I intend to do. I needn't fool around with proposed order and all that kind of thing, and take time. It is a simple thing. That is what I shall do.

Your motion is denied.

Have you anything to say, Mr. Burke?

MR. BURKE: Not after what your Honor just said. I don't think I can anything to it.

THE COURT: I shall make an order before I leave on my vacation, an order dismissing the complaint. You needn't bother about a proposed order. I will make the order.

.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 38] (File Endorsement Omitted)

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civ-13052

UNITED STATES OF AMERICA

- vs -

GAETANO LUCCHESI, etc.

Before: INCH, J.

Motion for resettlement of the Order of Judgment signed and entered on July 16th, 1959, etc.

Appearances: Cornelius W. Wickersham, Jr., U.S. Attorney, Attorney for Plaintiff, by Irwin J. Harrison, Asst. U.S. Attorney.

Richard J. Burke, Attorney for Defendant.

Motion Argued & Denied

ORDER DENYING MOTION FOR RESETTLEMENT—July 24, 1959

After hearing oral argument by counsel for both parties and reading all the papers, it is hereby ordered that plaintiff's motion to resettle the order on judgment, signed and entered July 16, 1959, be and the same is hereby denied, in all respects.

Enter,

/s/ Robert Inch
U.S.D.J.

[fol. 39] IN UNITED STATES DISTRICT
COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 13052

UNITED STATES OF AMERICA, PLAINTIFF

- against -

GAETANO LUCCHESI, also known as THOMAS LUCCHI,
also known as THOMAS LUCASE, also known as
THOMAS ARRA, also known as THOMAS LUCCHI,
DEFENDANT

*NOTICE OF APPEAL—Filed September 11, 1959

SIR:

PLEASE TAKE NOTICE that the UNITED STATES OF AMERICA, plaintiff herein, hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the Order on Judgment signed by United States District Judge ROBERT A. INCH on the 16th day of July 1959, as provides for mere dismissal of the Complaint herein, and fails to specify that said dismissal is without prejudice; and

PLEASE TAKE FURTHER NOTICE that plaintiff hereby also appeals to the aforesaid Court of Appeals from the Order signed by United States District Judge ROBERT A. INCH on the 24th day of July 1959, and entered on that date, denying plaintiff's motion to resettle the aforesaid Order on Judgment, and from each and every part thereof.

Dated: Brooklyn, New York, September 11th, 1959.

Yours, etc.,

CORNELIUS W. WICKERSHAM, JR.,
United States Attorney,
Eastern District of New York,
Attorney for Plaintiff,
271 Washington Street,
Brooklyn 1, New York.

By:

/s/ Irwin J. Harrison,
Assistant United States Attorney.

To:

CLERK,
UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.
RICHARD J. BURKE, Esq., Attorney for Defendant,
60 Wall Street, New York 5, New York.

[fol. 39A] AFFIDAVIT OF MAILING
 (Omitted in printing)

[fol. 39B] (File Endorsement Omitted)

[fol. 40]

IN UNITED STATES COURT
OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLANT

- against -

GAETANO LUCCHESI, also known as THOMAS LUCKESE,
also known as THOMAS LUCASE, also known as
THOMAS ARRA, also known as THOMAS LUCHESE,
APPELLEE

NOTICE OF AND MOTION TO DISMISS APPEAL—
Filed October 15, 1959

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of RICHARD J. BURKE sworn to the 8th day of October, 1959 and the exhibits annexed thereto, a motion will be made before this Court by the undersigned at the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, on the 13th day of October, 1959 at 10:30 A.M. in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the appeal herein on the ground that this Court lacks jurisdiction thereof.

Dated, New York, October 8th, 1959.

Yours, etc.,

RICHARD J. BURKE
Attorney for Appellee

To:

HON. CORNELIUS W. WICKERSHAM, Jr., Esq.
United States Attorney for the
Eastern District of New York
United States Courthouse
271 Washington Street
Brooklyn 1, N. Y.

[fol. 41] UNITED STATES COURT
 OF APPEALS
 FOR THE SECOND CIRCUIT

AFFIDAVIT OF RICHARD J. BURKE

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

RICHARD J. BURKE being duly sworn, deposes and says: I am the attorney for the above named appellee, and I make this affidavit in support of a motion to dismiss the appeal herein on the ground that this Court lacks jurisdiction thereof.

The Supreme Court of the United States in its opinion herein reported at 356 U.S. 256, granting a petition for a writ of certiorari and reversing the judgment of this Court, on April 7, 1958, remanded the case to the District Court "with directions to dismiss the complaints."

A copy of that judgment of the Supreme Court now on file in the office of the Clerk of the District Court for the Eastern District of New York, certified by the Clerk of the Supreme Court of the United States as of May 9, [fol. 42] 1958, is annexed hereto marked Exhibit A. On July 16, 1959 the United States Attorney submitted for signature to the United States District Court a proposed "Order on Judgment" providing for the dismissal of the complaint "without prejudice". On the same day deponent submitted a proposed "Order on Judgment" which was identical with the Government's proposed order except that it omitted the words "without prejudice." This latter order was the one signed by the District Judge, and a copy is annexed hereto marked Exhibit B.

The Government moved before the District Court on July 24, 1959 to resettle the Order on Judgment so as to include the words "without prejudice", and that motion was argued and denied.

On September 11, 1959 the Government appealed to this Court from so much of the Order on Judgment as failed to specify that the dismissal was "without prejudice" and also from the denial of its motion to resettle that order.

The Government has moved before this Court for an enlargement of time in connection with that appeal, and deponent has submitted an affidavit in opposition thereunto, annexed to which is a copy of the Government's notice of appeal, to which the Court is respectfully referred, since both motions are being heard at the same time.

The Supreme Court not having included the words "without prejudice" in its opinion and judgment, the District Court has also refrained from using such language in its order entered in compliance with the Supreme Court mandate. The present appeal therefore concerns itself solely with the question of whether the District Court has properly construed and obeyed the mandate of the Supreme Court. It is well settled, as the cases cited in the memorandum submitted herewith demonstrate, that that question is not within the jurisdiction of this Court. It is for the Supreme Court alone to construe and enforce its mandate. Therefore this appeal should be dismissed.

Sworn to before me this 8th day of October, 1959.

RICHARD J. BURKE

RUTH FLAX, Notary Public, State of New York, No. 03-6331000. Qualified in Bronx County. Commission Expires March 30, 1960.

[fol. 44] (File Endorsement Omitted)

• • • • •

IN UNITED STATES COURT OF APPEALS

OPINION—October 15, 1959

Appellee's motion to dismiss the appeal is granted. Upon clear authority and in reason there was no basis for Judge Inch to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment. We have no occasion now to pass on the effect of that command upon possible later litigation.

/s/ C. E. Clark, U.S.C.J.

/s/ J. J. Smith, U.S.D.J.

October 15, 1959

[fol. 45] IN UNITED STATES COURT
OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GAETANO LUCCHESI, also known as THOMAS LUCKESE,
also known as THOMAS LUCASE, also known as
THOMAS ARRA, also known as THOMAS LUCCHESI,
DEFENDANT-APPELLEE

Present: HON. CHARLES E. CLARK,
Chief Judge.

HON. J. JOSEPH SMITH,
District Judge.

JUDGMENT—October 15, 1959

A motion having been made herein by counsel for the
appellee to dismiss the appeal for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted,
and that the appeal from the order of the United States
District Court for the Eastern District of New York be
and it hereby is dismissed.

A. DANIEL FUSARO,
Clerk

[fol. 45A] (File Endorsement Omitted)

[fol. 46] IN UNITED STATES COURT
OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA, APPELLANT

v.

GAETANO LUCCHESI, also known as THOMAS LUCCHESI,
also known as THOMAS LUCASE, also known as
THOMAS ARRA, also known as THOMAS LUCHESE,
APPELLEE

NOTICE OF AND MOTION FOR LEAVE TO FILE A PETITION FOR
REHEARING AND OTHER AND FURTHER RELIEF—Filed
March 11, 1960

SIR:

PLEASE TAKE NOTICE that upon the annexed Affidavit of
MARGARET E. MILLUS, Assistant United States Attorney
for the Eastern District of New York, sworn to the 3rd
day of March, 1960, appellant will move this Court by
submission only on March 8, 1960 for an order permitting
appellant to file a petition for rehearing of a motion to
dismiss an appeal and on rehearing to deny the motion
and permit the Government to file the record and docket
the appeal in question, as further described herein.

No appearance or submission by counsel for appellee
is necessary.

Dated: Brooklyn, New York
March 3, 1960

Yours, etc.

CORNELIUS W. WICKERSHAM, Jr.
United States Attorney,
Eastern District of New York,
Attorney for Appellee,
271 Washington Street
Brooklyn 1, New York

By:

/s/ Margaret E. Millus,
Assistant United States Attorney

To:

RICHARD J. BURKE, Esq.
Attorney for Appellee
60 Wall Street
New York 5, N. Y.

[fol. 47] UNITED STATES COURT
OF APPEALS
FOR THE SECOND CIRCUIT

AFFIDAVIT OF MARGARET E. MILLUS

COUNTY OF KINGS)
STATE OF NEW YORK) SS:

MARGARET E. MILLUS, being duly sworn, deposes and says:

I am an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such, and am familiar with and in charge of this proceeding.

This affidavit is submitted in support of a motion for an order permitting appellant to file a petition for rehearing.

On April 7, 1958 the Supreme Court of the United States, in granting petitions for Writs of Certiorari, in *Costello v. United States* and the instant case in the same opinion, reversed the judgments of this Court in said cases and remanded the cases to the District Courts for the Southern and Eastern Districts of New York, respectively, with directions "to dismiss the complaints" (356 U.S. 256, 257).

The ground for such reversal and remand was that "an affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings."

On May 1, 1958 the United States Attorney for the Southern District of New York instituted a new denaturalization proceeding against Costello and an affidavit of good cause was filed contemporaneously with the complaint.

Shortly thereafter, United States District Judge John F. X. McGohey signed an Order on Judgment in the first [fol. 48] *Costello* case which provided only "that plaintiff's complaint be and the same hereby is dismissed" and did not specify that such dismissal was without prejudice.

The United States took no appeal from that order of dismissal.

Meanwhile on July 16, 1959 the United States Attorney for the Eastern District of New York submitted for signature a proposed "Order on Judgment" in the instant case providing for the dismissal of the complaint "without prejudice." On the same day counsel for Lucchese submitted a proposed "Order on Judgment" which was identical with the Government's proposed order except that it omitted the words "without prejudice." This latter order was the one signed by the District Judge.

On July 24, 1959 the Government moved to resettle the Order on Judgment to include the words "without prejudice" and that motion was argued and denied.

On September 11, 1959 the Government appealed to this Court from so much of the Order on Judgment as failed to provide that the dismissal was "without prejudice" and also from the denial of its motion to resettle that order.

Thereafter the Government requested this Court to extend its time to file the record and docket its appeal until forty (40) days after the Court's decision on the appeal in *United States v. Costello* which had been tried in the United States District Court for the Southern District of New York, and a decision rendered for the Government on February 20, 1959, or, in the event of a petition for certiorari, until forty (40) days after the decision of the Supreme Court. This Court, however, on motion of appellee, dismissed the Government's appeal in the instant case on October 15, 1959 and stated:

" . . . there was no basis for Judge Ingraham to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment."

On February 17, 1960 this Court affirmed the denaturalization of *Costello*. Although *Costello* had argued that [fol. 49] the complaint was barred under principles of res judicata since there had not been a dismissal of the complaint "without prejudice," this Court pointed out that "there is nothing to the point" and stated: (p. 813)

"There may have been an error by the district court in its refusal to add the words, proposed by the Government, that the dismissal of the complaint

should be 'without prejudice'. However, *this error, if it was an error, could have been corrected on appeal, and no appeal was taken from the district court's order of dismissal.*" (emphasis added)

In view of the foregoing holding in the *Costello* case the Government requests this Court to grant the instant motion to permit it to file a petition to rehear the motion to dismiss the appeal, and on rehearing to deny the motion and permit the Government to file the record and docket its appeal from the Order on Judgment signed by United States District Judge Robert A. Inch on the 16th day of July 1959, as provides for mere dismissal of the complaint and fails to specify that said dismissal is without prejudice.

/s/ Margaret E. Millus
MARGARET E. MILLUS
Assistant U.S. Attorney

Sworn to before me this 3rd day of March 1960.

/s/
Notary Public

PETER A. PASSALACQUA, Notary Public, State of New York, No. 24-3028600. Qualified in Kings County. Cert. filed with Kings & Queens Co. Reg. Commission Expires March 30, 1961.

[fol. 50] (File Endorsement Omitted)

MOTION DENIED.

/s/ C. E. Clark,
U.S.C.J.

/s/ J. J. Smith,
U.S.D.J.

March 11, 1960

[fol. 51] IN UNITED STATES COURT
OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GAËTANO LUCCHESI, also known as THOMAS LUCKESI,
also known as THOMAS LUCASE, also known as
THOMAS ARRA, also known as THOMAS LUCHESE,
DEFENDANT-APPELLEE

Present: HON. CHARLES E. CLARK,
Circuit Judge.

HON. J. JOSEPH SMITH,
District Judge.

ORDER DENYING MOTION FOR REHEARING—March 11, 1960

A motion having been made herein by counsel for the
appellant for leave to file a petition for rehearing and
other and further relief,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. DANIEL FUSARO
Clerk

[fol. 51A] (File Endorsement Omitted)

[fol. 52] UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

Clerk's Certificate to foregoing
transcript omitted in printing.

[fol. 53] SUPREME COURT OF THE
UNITED STATES

(Title Omitted)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—January 12, 1960

UPON CONSIDERATION of the application of counsel for
petitioner,

IT IS ORDERED that the time for filing petition for writ
of certiorari in the above-entitled cause be, and the same
is hereby, extended to and including March 14th, 1960.

/s/ John Marshall Harlan
Associate Justice of the Supreme
Court of the United States.

Dated this 12th day of January, 1960.

[fol. 54] SUPREME COURT OF THE
UNITED STATES

No. 789, October Term, 1959

UNITED STATES, PETITIONER

VS.

GAETANO LUCCHESI, ETC.

ORDER ALLOWING CERTIORARI—May 16, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The motion to amend the petition for certiorari in No. 802 is assigned for hearing and consolidated with the argument on the merits in this case and a total of one hour is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.